says that the Federal Court has jurisdiction only to hear an appeal by a person convicted by the High Court in the exercise of its original criminal jurisdiction. We could not hear this appeal because the appellant here had not been convicted. In fact what happened was this: he was about to be tried in the sessions court in Kota Bharu on a charge of possession of a pistol contrary to section 3(1) of the Arms Act, 1960. The charge said that the pistol was a pen-type pistol. The accused's counsel asked to see it before the trial, but the prosecution refused to let him do so. The accused then applied by motion to the High Court for an order that he be permitted to see and inspect it before the trial. Ibrahim J. rejected the application. The accused appealed to us.

Subsection (4) of section 50 says that the Federal Court also has jurisdiction to hear and determine matters brought before it in accordance with the provisions of sections 64, 65 or 66 of the Act. Well, this matter had not been brought before us under any of those sections.

When pressed during the course of the arguments, Mr. Jegathesan agreed that we had no jurisdiction.

Appeal struck out.

Solicitor: *Jega & Co.*

HOOI WING CHEONG & ANOR. v. LOGANAYAKI

[F.C. (Azmi, L.P., Suffian and Ali F.JJ.) October 19, 1971]

[Malacca — Federal Court Civil Appeal No. 16 of 1971]

Contract — Application for rescission — Specific Relief (Malay States) Ordinance, 1950, s. 34.

The plaintiff had applied for rescission of three agreements made between her and the two defendants. These three agreements were identical in all respects and each was concerned with the purchase by the plaintiff of a piece of land and a house which was being built at the time of the agreement. She alleged that there was a collateral oral contract that the payment of the balance of the purchase price would be arranged by a loan from a bank. The learned trial judge rejected the alleged oral contract, but went on to hold that the deposit of $9,000 should be returned to the plaintiff, as the defendants had agreed to extend the time for payment. On appeal,

Held, allowing the appeal: the learned trial judge should have dismissed the plaintiff's claim on the ground that the plaintiff had not proved the alleged collateral oral agreement, and should not have dealt with the question of repayment of the deposit.

FEDERAL COURT.

W. H. Sault (*Thara Singh Sidhu* with him) for the appellants/defendants.

Atma Singh Gill for the respondent/plaintiff.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal by the defendants against the judgment of the High Court at Seremban.

The plaintiff brought this suit for the recission of three agreements made between her and the two defendants. These three agreements were identical in all respects and each is concerned with the purchase by the plaintiff of a piece of land and a house which was being built at the time of the agreement. Each lot and house cost $27,000. On signing the agreement she paid $3,000 under each agreement. She promised to pay the balance of the purchase price of $24,000 in the following manner: —

(a) On or before 11th January 1965	$5,000
(b) On or before 28th January 1965	$5,000
(c) Upon the completion of the house	$3,000

The balance of the purchase price of $11,000 is to be paid within three weeks from the date of the receipt of a notice from the defendants that the issue document of title of the land has been obtained from the appropriate authorities.

But the plaintiff in her statement of claim further alleged in paragraph (3) of it as follows: —

"At the time of and in consideration of the plaintiff's entering into the agreements for sale, the plaintiff informed the defendants that the balance of the agreed instalments in respect of the balance of the purchase price will be paid in one lump sum at the time of transfer by obtaining a loan from a bank. Wherefore the defendants orally agreed with the plaintiff, as an agreement collateral to the said agreement for sale and to the intent that the plaintiff should rely thereon that the balance of the instalments were to be paid in one lump sum by a loan to be raised on a charge from a bank by the plaintiff in conjunction with the transfer. The defendants well knew that the plaintiff did not have so much money to meet the instalments, when same fell due."

She went on to say that contrary to that oral agreement, the defendants by their letter to her dated 13th January 1965 demanded from her payment of the next instalment of $5,000 within three days from the date of the letter and failing which they said they would forfeit the first instalment. Her statement of claim goes on further to say that on 17th March 1965 she explained again the whole transaction and indicated that she was ready and willing to perform her obligation in accordance with the collateral oral agreement made between her and the defendants. When the defendants failed to reply to this letter the plaintiff by letter dated 23rd April 1965 rescinded the said agreements and demanded repayment of the first instalment of $9,000 paid under the three said agreements. The defendants denied the existence of any such collateral agreement. Though admitting the receipt of the letter of 17th March 1965, they contended that by that time they had already exercised the rights in treating the contract at an end and deposit forfeited by virtue of the terms and conditions of the three said agreements. They denied that the plaintiff was entitled to claim for the refund of the deposits. At the trial, the plaintiff confessed in her evidence that she herself knew nothing about this alleged oral agreement and explained that though she signed the agreements the whole matter was handled by her husband and on her behalf.

Her husband P.W.2 gave evidence in support of plaintiff's claim and as to the existence of the collateral oral agreement. The learned judge, however, rejected the alleged collateral oral agreement in these words: —

"Taking into consideration the evidence on this issue it is, to my mind, improbable in the circumstances of the case that the alleged oral agreement as contended by P.W. 2 ever took place at all. Not only the plaintiff knew nothing about

it, but P.W. 2 while admitting that there were many oral agreements between him and the first defendant, was not sure himself whether the alleged oral and collateral agreement was made prior to, contemporaneously or after the written agreements.

He, however, notwithstanding that finding of fact he made, proceeded to consider the question whether the deposits of $9,000 should be forfeited to the defendants or be returned to the plaintiff. He finally came to the view that the whole sum should be returned to the plaintiff, because the defendants by their letter of 13th January 1965 in extending the period for the payment of the next instalment of $5,000 due on 11th January 1965 for a further period of three days, had waived the conditions in the written agreement that time was of the essence of the contract. He then went further to say that in the circumstances, the period of three days given for the payment of the next instalment was not reasonable. On the question of damages he held that the defendants having already received benefit by having used the $9,000 for about six years had been sufficiently compensated. He finally directed that the whole sum of $9,000 be refunded without interest to the plaintiff.

In my view, the learned judge should have dismissed the plaintiff's suit on the ground that the plaintiff had failed to prove the alleged collateral oral agreement. The defendants had not made a cross claim for damages for breach of contract and it is therefore not necessary for the learned judge to deal any further on the question of repayment of the $9,000. I would therefore allow the appeal with costs here and in the court below, the defendants' deposit of $500 to be returned to them.

Suffian F.J.: With respect I agree that this appeal be allowed.

The plaintiff/respondent bought three houses by three separate agreements from the defendants/appellants who were housing developers. She failed to pay the instalments by the due date. She then sued the defendants. She said that the written agreements had been varied with the consent of the appellants, that the instalments had not fallen due, and that the deposit she paid should be refunded to her.

She asked the court to rescind the agreements.

The learned trial judge found that they had not been varied by the defendants. Nevertheless, for reasons already stated, he gave judgment for the plaintiff.

The defendants appeal to us.

It is important to remember that the plaintiff sued to rescind the agreements; she did not sue for specific performance. Now, the court can rescind them only on the grounds set out in section 34 of the Specific Relief (Malay States) Ordinance, 1950. Paragraphs (b) and (c) of that section clearly cannot apply. That leaves only paragraph (a). According to that paragraph, the court may rescind these agreements if they are voidable or terminable by the plaintiff. How can they be voidable or terminable by her? She was the party at fault; the defendants were not at fault.

Much was made of the fact that when she defaulted in payment of the instalments the defendants gave her three days' grace within which to pay. It is said that by this the defendants had waived the clause in the agreements stipulating that time was of the essence and that three days' grace was not reasonable. Even if that is so, and even if in the circumstances the plaintiff should have been given more than three days, there is no denying the fact that she has never paid the money, not even to this day. The truth is that she was never in a position to pay. So I do not see how the agreements were voidable or terminable by her. If at all, they were voidable or terminable by the vendors. So the court cannot rescind these agreements.

Ali F.J.: I am of opinion that this appeal be allowed.

The appellants are land developers in Negeri Sembilan. In 1964 they entered into written agreements with the respondent, a married woman, for the sale and purchase of divided housing lots for an agreed sum of money. The respondent agreed to purchase three of these housing lots together with houses to be erected thereon by the appellants. She paid in respect of each lot a sum of $3,000 by way of advance payment. The written agreements expressly provided that the balance of the purchase monies was to be paid by instalments on specified dates. There is also a provision that time wherever stated in the agreement was of the essence.

The respondent did not pay the first instalment on due date, *i.e.*, January 11, 1965, and the appellants in a letter dated January 13, 1965 wrote to her reminding her of her undertaking in the agreement and threatening to forfeit the $9,000 if she failed to pay within three days. About two months later the respondent through her solicitors replied to the appellants' letter in these terms:

"Your clients were fully informed by my client's husband Mr. V. Kumarasamy that the progress payments mentioned in the agreements will not be made unless your clients were in a position to give a registrable transfer free from all encumbrances for the abovementioned lots. The reason for this was that my client would then charge same to a bank or society in order to pay your clients' dues in full. Your clients had agreed to produce the titles by end of April, 1965.

This was again explained to you by the aforesaid Mr. V. Kumarasamy when he interviewed your Mr. Maniam after you wrote and demanded the 1st payment of $15,000/- *vide* your letter of 13.1.65. The mode of payment insisted throughout by my client's aforesaid husband was therefore acquiesced and that is why my client has not been written to since 13.1.65.

I understand from my client that the houses have been completed and rented out to the military with effect from 1.3.65 at a rental of $280/- per month. Whereupon your clients have collected a year's rent in advance. To do this no authority of any sort was asked from my client and as such your client's aforesaid act is unauthorised.

My client is ready and willing to pay the balance of the purchase price for the aforesaid houses, as soon as your clients are in a position to give her a registrable transfer as aforesaid, so that she could charge the aforesaid houses in conjunction with the said transfers and obtain a loan therefor."

It would seem clear to me that the respondent refuses to pay the balance of the purchase price unless the lands are transferred to her so that she can mortgage them to a bank to obtain a loan and settle the balance. In the event, she brought an action against the appellants claiming rescission of the written agreements. The only ground for her claim was that the appellants are in breach of an oral agreement which, she says, is collateral to the written agreements. That was her cause of action on the pleadings. The appellants' defence was a denial of the existence of the alleged oral agreement. If the case had been considered purely on the basis whether the respondent is entitled to rescind the written contracts the matter would have been concluded by the trial court's finding that the oral agreement did not exist. But the trial judge in this case went further to consider whether time was of the essence of the written contracts. On the evidence of the appellants' letter of January 13, 1965 giving the respondent three days within which to pay the first instalment and in the light of authorities cited, the trial judge took the view that time was not of the essence and proceeded to the conclusion that the respondent was entitled to rescind the contracts. With respect, I find it difficult to comprehend the logic of that conclusion. The respondent was not seeking specific performance as would make the question of time being of the essence relevant. Not being relevant it was pointless to consider whether there has been a waiver of the condition that time was of the essence. The only issue is whether the respondent is entitled to rescind the contract and treat herself as being discharged from all her obligations. As it seems to me neither in fact nor in law is there any ground on which an order of rescission could be granted. The authorities cited and discussed have no bearing whatsoever on the real issue before the court. I have no doubt that this case has been wrongly decided.

A few words on the order directing the appellants to refund the $9,000. If the respondent cannot succeed on her main claim for rescission the whole action fails. Whether or not the appellants are entitled to forfeit the money is a different question altogether. The question did not arise for decision in these proceedings although a great deal was said about it in the course of counsel's arguments.

I shall be content to hold that this appeal be allowed and the judgment of the court below be set aside with costs here and below.

Appeal allowed.

Solicitors: *Sault, Thara & Co.; Atma Singh Gill & Co.*

TIOH KOOI LAN v. ISMAILJEE

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) October 19, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 41 of 1971]

Landlord and Tenant — Controlled premises — Part of the premises burnt down by fire — Affected parts repaired and wooden shutters replaced with new metal gates — Whether "premises" are "new" as completed after 31st January 1948 — Control of Rent Act, 1966, ss. 4(2)(a) and 18.

In this case the learned trial judge had dismissed the plaintiff's suit for possession on the ground that she had not discharged the onus of showing that there had been such radical structural alterations as to bring the premises within the meaning of "new premises".

Held: the appeal should be dismissed on the ground that on the facts of the case the plaintiff had failed to prove that the building was completed after January 31, 1948.

Semble: the test applied by the learned trial judge, merely that a building though completed before January 31, 1948 but which has since that date been so fundamentally changed that it can no longer be said to exist and that another building has replaced it, is not correct.

Cases referred to:-

(1) *Pritam Kaur* v. *Rajaratnam* [1970] 2 M.L.J. 109.

(2) *Eastern Realty Co. Ltd.* v. *Chan Hua Seng* [1967] 2 M.L.J. 195.

(3) *Success Enterprises Ltd.* v. *Eng Ah Boon* [1968] 1 M.L.J. 75.

(4) *Kai Nam (a firm)* v. *Ma Kam Chan* [1950] A.C. 358.

FEDERAL COURT.

K. K. Lam for the appellant.

R. R. Chelliah (*Iyadurai* with him) for the respondent.

Azmi L.P.: We dismissed this appeal at the last hearing and as indicated then here are my grounds for dismissing the appeal.

This is an appeal against the judgment of Raja Azlan Shah J. He dismissed the claim of the plaintiff, the owner of premises known as 28 Station Road, Slim River, for a declaration, to put it briefly, that by reason of the destruction of the major portion of the premises by fire, and the same portion rebuilt, the premises ceased to be controlled premises

The evidence would show that on 13th January 1967, the front and business portion of the building was burnt down by fire. The fire destroyed the roof and damaged the plastering of the party walls and the front wooden shutters. With the permission of the local council she replaced and repaired the affected parts at a cost of $5,000. The wooden shutters were replaced with new metal gates. The rear part of the premises, where the tenant and his family lived, was unaffected by the fire, so that he continued to live there and never left the premises because of the destruction of the business portion.

The learned judge dismissed the plaintiff's suit on the ground that he was not satisfied that she had "discharged the burden placed on her of showing that there had been radical structural alterations so as to bring it within the meaning of 'new' premises." In deciding the question whether the premises had ceased to be controlled premises, he had applied the test ap-